

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ADVOCATES FOR RESPONSIBLE
DEVELOPMENT,

Petitioner,

v.

MARK and KIM MAREE JOHANNESSEN
and MASON COUNTY,

Respondents.

SHB NO. 05-014

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

A hearing was held in the above matter on October 26, 2005, at the Board's Office in Lacey, WA. The Shorelines Hearings Board was comprised of the following members: Bill Clarke, Chair, Mary Alyce Burleigh, and Pete Philley.¹ Administrative Appeals Judge, Kay M. Brown presided over the hearing. Gene Barker and Associates of Olympia, Washington, provided court reporting services. The Petitioner, Advocates for Responsible Development (ARD) appeared pro se through its member representative John Diehl. Mason County appeared through its attorney, Deputy Prosecuting Attorney T.J. Martin. Respondents Mark and Kim Maree Johannessen (Johannessens) appeared through Attorney Roger A. Pearce.

¹ A panel of three board members is hearing this appeal. See RCW 90.58.185. Kevin Ranker was originally on the panel, but because of the need to reschedule the hearing he was unable to participate.

1 PRELIMINARY MATTERS

2 A. Request for Recusal

3 At the beginning of the hearing, ARD orally requested the board members consider
4 recusing themselves on the basis of bias. ARD contends the Board Members are biased against
5 it because the Members are aware of the arrest of their representative Dr. Diehl.² The Board
6 Members have considered ARD's request. All of the Board Members believe that they can
7 decide this appeal in a fair and impartial manner, and therefore decline to recuse themselves.

8 B. Motion for Reinstatement

9 Following the close of the record, but before issuance of this decision, John Diehl moved
10 the Board for an order reinstating him as an individual petitioner in this matter. Mr. Diehl's
11 motion was filed on November 7, 2005.

12 Mr. Diehl and ARD filed petitions for review of Mason County's decision on the
13 Shoreline Substantial Development Permit (SDP) for the Johannessen's bulkhead on May 31,
14 2005. Both ARD and Mr. Diehl were defaulted out of the proceedings and their petitions were
15 dismissed, due to Mr. Diehl's failure to appear at the first scheduled hearing date on September
16 1, 2005. *See* Order Granting Default and Dismissing Appeal, SHB No. 05-014 (September 21,
17 2005). Subsequently, ARD was reinstated and the dismissal order was vacated, based on the
18 agreement of the parties. *See* Order Vacating Default and Reinstating Appeal by Respondent
19 ARD; Stipulation Re: Vacating Default filed with the Board on October 13, 2005. The hearing

20 ²ARD does not assert any other basis for recusal other than the potential for bias against ARD because of the arrest
21 of ARD's representative Mr. Diehl.

1 then proceeded at a newly scheduled time, with ARD as the petitioning party. Mr. Diehl
2 participated as ARD's member representative and as a witness, but not as an individual party.

3 Mr. Diehl sites no legal authority for the motion. Factually, the motion is based on Mr.
4 Diehl's position that the Mason County Prosecuting Attorney misrepresented his involvement
5 with Mr. Diehl's arrest on the morning of the first scheduled hearing, which resulted in his
6 failure to appear for the hearing. Mr. Diehl offers copies of e-mails obtained through the public
7 disclosure process in support of his position.

8 The Board denies Mr. Diehl's motion for the following reasons. First, the act of
9 reinstating Mr. Diehl would involve reversing a default and final order of dismissal entered by
10 the Board on September 21, 2005. The time period allowed for vacation of a default order, the
11 time period for reconsideration, and the time period for appeal to court, have all run. *See* RCW
12 34.05.440(3), WAC 461-08-485(1)(allowing seven days to move to vacate a default); RCW
13 34.05.470(1), WAC 461-08-565(1)(a)(allowing 10 days to petition for reconsideration); RCW
14 34.05.542(2); WAC 461-08-570 (allowing 30 days for the filing of an appeal to court for judicial
15 review). Mr. Diehl has cited no basis for the Board to exercise jurisdiction over its final default
16 and dismissal order in this matter.

17 A second reason for the denial is that Mr. Diehl entered into a settlement agreement
18 whereby ARD was reinstated and Mr. Diehl was expressly not reinstated. *See* Stipulation Re:
19 Vacating Default, filed October 13, 2005, par. 2 (John E. Diehl may continue to represent ARD,
20 but shall no longer be a party to the case). The Board has held that written settlement

1 agreements between parties are enforceable if reduced to writing and signed. *Thompson v. Lewis*
2 *Co. et. al.*, SHB No. 01-008 (November 12, 2004)(Order of Dismissal.) In this case, reinstating
3 Mr. Diehl as a party is inconsistent with the parties' settlement agreement regarding the vacation
4 of the default against ARD.

5 Finally, even if the Board considers the substance of the factual material presented by Mr.
6 Diehl, and accepts it as establishing that the Mason County Prosecuting Attorney's office was
7 aware that Mr. Diehl would be arrested on the morning of the hearing, this fact alone does not
8 establish a basis for vacating the Board's default order. The key fact in the entry of the default
9 order was that Mr. Diehl failed to appear at the hearing. *See* RCW 34.05.440(2)(If a party fails
10 to attend a hearing, a default or other dispositive order may be entered). The reasons for that
11 failure might have become more important had the Board been asked to vacate the default;
12 however the only motion to vacate filed after the entry of the default order was by ARD, not Mr.
13 Diehl, and it was ultimately settled prior to issuance of a decision by the Board.

14 This matter has gone through a full hearing before the Board with Mr. Diehl participating
15 as a member representative of ARD and also testifying as a witness. The Board declines at this
16 late date to reinstate Mr. Diehl as a party.

17 The Board received sworn testimony of witnesses, exhibits, and argument on behalf of
18 the parties. Having fully considered this record, the Board enters the following:

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
SHB NO. 05-014

1 FINDINGS OF FACT

2 I.

3 The Johannessens applied to Mason County for a SDP to construct a rock bulkhead on a
4 vacant lot, Lot 3, abutting Pickering Passage in Mason County. The lot faces south, directly into
5 the prevailing winds. Kim Maree Johannessen is the owner of Lot 3 and adjacent Lot 4. She
6 purchased both lots in August 2000. Her parents live on Lot 4, and Ms. Johannessen visits the
7 property at least one time per month. In addition to constructing a terraced bulkhead on Lot 3,
8 Ms. Johannessen intends to remove the vertical bulkhead that exists on Lot 4. That bulkhead
9 will be replaced with a terraced bulkhead that will blend with the one proposed for Lot 3. Work
10 on the two projects is intended to proceed simultaneously. *Testimony of K. Johannessen, M.*
11 *Johannessen.*

12 II.

13 After receipt of the application for the bulkhead on Lot 3, the County conducted a State
14 Environmental Policy Act (SEPA) review of the proposed project. The County issued a
15 Mitigated Determination of Nonsignificance (MDNS) on December 30, 2004. On January 12,
16 2005, the Washington Department of Ecology (Ecology) suggested additional mitigation
17 measures for the project to assure there would be no impact to water quality. On January 31,
18 2005, the Washington Department of Fish and Wildlife issued a Hydraulic Approval (HCP) for
19 the project. The HCP contained 31 conditions designed to assure that there would be no adverse
20

1 impact to fish. Petitioners did not file timely administrative appeals of the SEPA decision.

2 *Testimony of Miller, K. Johannessen, Exs. R-1 through R-8.*

3 III.

4 The County hearing examiner issued the County's final decision granting the SDP on
5 May 4, 2005. The SDP included all of the conditions recommended by Ecology. ARD³
6 appealed the County's decision to this Board. *Testimony of Miller, Exs. R-1 and R-2.*

7 IV.

8 Lot 3 is located along a stretch of shoreline with many residential lots. The adjacent lots,
9 and all of the lots in the vicinity to the north and south of Lot 3 are already protected by
10 bulkheads, with the exception of some lots which are located inward to the north where Walker
11 Landing ends. Lot 3 is 76 to 80 feet wide at the ordinary high water mark, and narrows to 45
12 feet as it extends landward. The shoreline of Lot 3 is characterized by a 9 to 10 feet high bank.
13 *Testimony of Miller, K. Johannessen, M. Johannessen, Exs. R-2 and R-10.*

14 V.

15 The county planner testified that she did not initially think of the bank along Lot 3 as a
16 feeder bluff as that term is used in the Mason County Shoreline Master Program because the
17 bank was not very tall, and the adjacent property on both sides was bulkheaded. However, she
18 testified that the bank does deposit beach material. *Testimony of Miller, Ex. R-2.*

19 ³ Mr. Diehl appealed as well, but was defaulted from the proceedings before this Board when he failed to attend the
20 hearing. ARD, who was being represented by Mr. Diehl, was also defaulted, but the default order against ARD was
21 vacated by stipulation of the parties. See Order Vacating Default and Reinstating Appeal by Advocates for
Responsible Development (Oct. 19, 2005).

1 VI.

2 Doug Myers, a marine ecologist with Puget Sound Water Quality Action Team, testified
3 that a feeder bluff is any bluff that erodes, regardless of height. Douglas Canning, Senior
4 Coastal Planner with Department of Ecology, testified that an important factor in determining
5 whether a bank is a feeder bluff is the geological competency of the material in the bank. Myers
6 testified that on an ecosystem level, feeder bluffs are important to the replenishment of beaches
7 in the Puget Sound area. Myers also testified that a site surrounded by bulkheads is less valuable
8 to the Puget Sound system as a feeder bluff than one in a generally unbulkheaded area. Neither
9 Myers nor Canning had been to Lot 3, and neither offered opinions as to whether the bank along
10 Lot 3 was a feeder bluff. *Testimony of Myers, Canning, Exs. P-1 and P-2.*

11 VII.

12 Lot 3 does not contain a residential structure, although it has been improved with
13 landscaping and accessory structures. Ms. Johannessen intends to put a house on the property,
14 hopefully within two to three years. She applied for a permit to build the bulkhead first;
15 however, because if the house were constructed first, the construction on the bulkhead would
16 have to be done from the water side. This is because of the narrowness of the lot. If the
17 bulkhead is constructed before the house, the major construction work can be done from the
18 landward side, thus having less impact on the shoreline. *Testimony of K. Johannessen, M.*
19 *Johannessen, Exs. R-1, R-2, R-18 and R-19.*

VIII.

Ms. Johannessen wants to build a bulkhead to protect Lot 3 from erosion. Lot 3 has been subject to erosion during the two years prior to the application for the bulkhead. There has been erosion on the south end of the lot due to the sharp edges on the bulkhead on Lot 4. The most significant erosion has been caused by wave action from storms that occurred near the end of 2002 and the beginning of 2003. This erosion is shown most clearly in the photographs in evidence by reference to a log on the beach on Lot 3, which was buried on December 28, 2002, and then completely exposed by January 6, 2003. The erosion on Lot 3 during storm events is exacerbated by the fact that the adjacent lots have bulkheads. These bulkheads create wave scour and reverse waves during storm events that impact Lot 3. *Testimony of K. Johannessen, M. Johannessen, Miller, Appy, Exs. R-15 A and R-16 E, see generally Exs. R-12 through R-17.*

IX.

The county planner's understanding of the meaning of shoreline boundary in the context of Lot 3 is that it is the toe of the slope. The toe of the slope has been eroded, as evidenced by pictures of the logs tied at the toe of the slope, taken at various times over the past two years. *Testimony of Miller, Exs. R-15 and R-16.*

X.

Lot 3 is located on an exposed point of land called Walker's Landing. All of the lots to the south of Lot 3 are bulkheaded. Lots immediately to the north of Lot 3 are also bulkheaded. These lots are similarly situated to Lot 3 in terms of wave and wind action from storms. The

only lots in the vicinity of Lot 3 that are not bulkheaded are further north and inland from Walker's Landing. These lots do not receive the wind and wave action received by Lot 3. *Testimony of Miller, M. Johannessen, K. Johannessen, Appy, Exs. R-1, R-2, R-8 through R-10, and R-15 through R-17.*

XI.

The bulkhead approved for construction on Lot 3 is a terraced rock bulkhead⁴ designed by Anchor Environmental. It will be about 4 feet high, approximately 80 feet long, and is located landward of the ordinary high water mark except a small portion on the southern end which is slightly waterward of the ordinary high water mark. Anchor's fish biologist, Elizabeth Appy, testified that the bulkhead on Lot 3, as designed, was to include overhanging vegetation in the first tier of the bulkhead. The rock terraced bulkhead with overhanging vegetation would provide opportunities for shading and would dissipate waves in a more natural manner than the high vertical bulkheads on the adjacent lots. *Testimony of Appy, Exs. R-1, R-2, R-8, R-9, R-18 through R-20 and R-22.*

XII.

The addition of vegetation, particularly vegetation overhanging the water in the first tier of the bulkhead, is one of the recommendations made in the Greater Mason County Nearshore Habitat Assessment for shoreline areas such as North Pickering Passage, which contain shoreline modifications with the potential for restoration. *Ex. P-2, p. 94.* This report was prepared by Ms.

⁴ In contrast to the terraced bulkhead proposed for Lot 3, other bulkheads in the area are not tiered and are completely vertical. *Testimony of K. Johannessen, M. Johannessen, and Ex. R-10.*

1 Appy's firm, Anchor Environmental, for the Squaxin Island Tribe, and was funded by the
2 Salmon Recovery Funding Board. The report also supports Ms. Appy's opinion regarding the
3 benefits of terracing bulkheads by stating that vertical bulkheading "increases wave energy in the
4 area, causing scour in front of the structure." *Testimony of Appy, Ex P-2, p. 97-98.*

5 XIII.

6 Ms. Appy further opined that the bulkhead, as designed on Lot 3, would protect the
7 natural shore features of the area. She testified that in her opinion, Lot 3 is subjected to wave
8 erosion from storm events, and therefore is not a good candidate for softer methods of armouring
9 such as tied logs on the beach. The Greater Mason County Near Shore Habitat Assessment
10 supports Ms. Appy's position that certain shorelines require harder types of armoring to prevent
11 property loss. *Testimony of Appy, Exs. R-18 through R-20; Ex. P-2, p. 97-98.*

12 XIV.

13 The construction of the rock bulkhead at issue on Lot 3 is being planned in conjunction
14 with replacement of a pre-existing treated timber vertical bulkhead on adjacent Lot 4, which is
15 south of Lot 3. The replacement bulkhead planned for Lot 4 will also be a terraced, vegetated,
16 rock bulkhead, which will have a profile of approximately 1 and ½ feet less than the existing
17 bulkhead. The terracing of this bulkhead wall, and the change from timber to rock, will dissipate
18 wave energy and decrease wave scour. The addition of overhanging vegetation will improve fish
19 habitat. Replacing the treated timber along the shoreline will also improve the water and
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21

1 sediment quality in the area of the bulkhead. *Testimony of Miller, K. Johannessen, M.*

2 *Johannessen, Appy, Exs. R-1, R-2, R-6, and R-18 through R-20.*

3 XV.

4 The bulkhead on Lot 4 will be placed shoreward approximately five feet from the
5 location of the existing bulkhead. By placing the bulkhead on Lot 4 shoreward from its existing
6 location, approximately 200 square feet of additional beach area will be added. This additional
7 beach will benefit fish habitat, and provide mitigation for the addition of the bulkhead on Lot 3.

8 *Testimony of Miller, K. Johannessen, M. Johannessen, Appy, Exs. R-1, R-2, R-6, R-18 and R-19.*

9 XVI.

10 John Diehl is a member of the petitioner group, Advocates of Responsible Development.
11 He lives approximately two and one-half to three miles from the Johannessens' property "as the
12 crow flies." None of the other members of ARD live closer then Mr. Diehl to the Johannessens
13 property. Mr. Diehl has never been to the Johannessen's property. He occasionally canoes or
14 kayaks on Pickering Passage. *Testimony of Diehl.*

15 XVII.

16 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

17 CONCLUSIONS OF LAW

18 I.

19 The Board has jurisdiction over this matter pursuant to RCW 90.58.180. ARD has the
20 burden of proof regarding the City's approval of the Shoreline Substantial Development Permit

1 (SDP) because ARD is requesting review of the granting of this permit. RCW 90.58.140(7).

2 The scope and standard of review for this matter is de novo. WAC 461-08-500(1).

3 II.

4 The Johannessens moved for partial summary judgment on four of the 10 issues
5 identified by the parties at the pre-hearing conference. The summary judgment was granted in
6 part and denied in part. See Order on Partial Summary Judgment (August 10, 2005). The
7 remaining issues before the Board are:

- 8 1. Do Petitioners have standing to bring this appeal before the Shorelines Hearings
9 Board (Board)?
- 10 2. By issuing a Determination of Nonsignificance (DNS) and failing to consider the
11 cumulative impacts of granting a permit for bulk heading a vacant parcel, did
12 Mason County fail to comply with the requirements of chapter 43.21 RCW,
13 (SEPA)? [Limited by the Board's Order on Partial Summary Judgment to
14 substantive SEPA only.]
- 15 6. Have the applicants failed to satisfy the requirement of MCC 7.16.110(c)(6) and
16 .110(d)(2) that they show that a bulkhead is necessary to re-establish a shoreline
17 boundary that has eroded away within the past two years?
- 18 7. Given the acknowledged functions of the bluff along Lot 3 as a feeder bluff,
19 would the proposed bulkhead be inconsistent with the requirements of RCW
20 90.58.020(2) and MCC 7.16.110(c)(1) to protect natural shore features and the
21 integrity of the natural geohydraulic system, including feeder bluffs?
8. Given known damage to marine life cause by bulkheads, would the proposed
bulkhead be inconsistent with the requirements of RCW 90.58.020(4) and MCC
7.16.110(c)(2) to protect the resources and ecology of the shoreline and to
conserve and enhance fish, shellfish, and other wildlife resources and habitats?
9. Given the function of the bluff along vacant Lot 3 as a feeder bluff, would the
proposed bulkhead be inconsistent with the requirement of MCC 7.16.110(c) that
the owners of property containing feeder bluffs should generally be discouraged
from constructing bulkheads, particularly in areas not already developed?
10. Given the environmental damage associated with bulkheads, and the potential for
cumulative effects through allowing bulk heading of vacant parcels, does granting
the proposed permit violate the requirement of RCW 90.58.020(1) that statewide
interests be protected over local interest?

1 A. Standing (Issue 1)

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3 III.

4 Respondents contend that ARD lacks standing to bring its appeal. To establish standing
5 to bring an appeal, a petitioner must demonstrate: (1) the governmental action at issue causes a
6 specific and perceptible injury-in-fact that is immediate, concrete and specific; and (2) the
7 interest the petitioner seeks to protect falls within the zone of interest that the environmental
8 statute is designed to protect. *Save a Valuable Environment v. Bothell*, 89 Wn. 2d 862, 865-68,
9 576 P.2d 401 (1978). The petitioner bears the burden of proof on this issue. *Center for*
10 *Environmental Law & Policy v. Ecology, et. al*, PHCB No. 96-165 (January 7, 1997)(Order on
11 Motion to Dismiss). An organization which shows that one or more of its members are
12 specifically injured by a government action may represent those members in proceedings for
13 judicial review. 89 Wn. 2d at 867.

14 IV.

15 Here, the injury identified by ARD is that one of its members, Mr. Diehl, kayaks and
16 canoes on Pickering Passage, and therefore that putting a bulkhead on Lot 3 would have a
17 negative impact on this recreational activity. Certainly, impact to a recreational interest can
18 establish standing. *Hale et.al, v. Island Co. et. al*, SHB Nos. 04-022 and 023 (Jan. 27,
19 2005)(Order on Motion to Dismiss for Lack of Standing.) Here, however, ARD has failed to
20 make the connection between the occasional use by one of its members of the waters of

Pickering Passage, and an injury to that recreational use from the placement of a bulkhead on a single lot in an area that is already heavily bulkheaded.

V.

The Board concludes ARD has failed to make a showing of standing to bring its petition.⁵ Since ARD lacks standing, this case could be dismissed without further analysis. However, since a full hearing has already been conducted by the Board, and in an effort to avoid the necessity of a second hearing by the Board on the merits in the event the Board's decision on standing is not upheld, the Board continues its analysis of the other legal issues raised by the parties.

B. SEPA Determination (Issue 2)

VI.

The Board has limited the SEPA issue in this matter to substantive SEPA due to ARD's failure to exhaust its SEPA administrative remedies before the county. *See* Order on Partial Summary Judgment, SHB No. 05-014 (August 10, 2005). ARD's SEPA challenge is based on its contention that the potential cumulative effects of the bulkhead on Lot 3 were not appropriately considered by the county when it approved the SDP. ARD did not present evidence regarding specific conditions that should have been included on the SDP for this bulkhead to mitigate for the impacts they claim exist. Therefore, ARD's argument, in essence,

⁵ Besides a general lack of standing to bring their appeal, Respondents also argue that ARD lacks standing to raise a substantive SEPA claim. Since the Board has concluded ARD has not established an injury in fact sufficient to bring its action as a whole, standing on the SEPA issue fails as well. Therefore, it is not necessary to reach Respondents' argument that ARD is not within the zone of interest protected by substantive SEPA.

1 challenges the validity of the threshold determination, which is a procedural challenge and
2 therefore barred.

3 VII.

4 The Board notes that it is not necessary to address the cumulative effects issue in the
5 context of SEPA, since the consideration of cumulative effects of the granting of an SDP on
6 other similar proposals is appropriate under the Shoreline Management Act (SMA). *Nooksack*
7 *Indian Tribe v. Ecology et. al*, SHB No. 95-1 (Order granting and Denying Summary
8 Judgment)(July 11, 1995). The cumulative impacts issue under the SMA is identified as Issue 7
9 in this matter, and will be analyzed under that issue.

10 C. Compliance with MCC 7.16.110

11 VIII.

12 The core of ARD's case is that the proposed bulkhead on Lot 3 does not comply with several
13 of the Mason County Shoreline Master Program policies and use regulations regarding
14 bulkheads.

15 IX.

16 MCC 7.16.110(c)⁶ policies on bulkheads provides the following policy statement:

17 (1) Bulkheads should be located, designed and maintained to protect natural shore
18 features and the integrity of the natural geohydraulic system, including feeder
bluffs, littoral drift corridors and accretion beaches.

19 (2) Bulkheads should be located, designed and maintained in a manner that will
20 conserve and enhance water quality, fish, shellfish, and other wildlife resources
and habitats.

21 ⁶ There are other policies related to bulkheads, but these are the ones at issue.

(3) Owners of property containing feeder bluffs should generally be discouraged from constructing bulkheads, particularly in areas not already developed or not already subject to shoreline modification.

...

(6) Bulkheads should be allowed only where evidence is present that one of the following conditions exists:

(A) Serious wave erosion threatens existing buildings or upland property.

(B) The proposed bulkhead is necessary to the operation and location of water dependent and/or water related activities consistent with the master program. In addition, it must be demonstrated that other alternatives are not feasible and that such bulkheads meet other policies and regulations of this chapter.

(C) The proposed bulkhead is necessary to re-establish a shoreline boundary that has been eroded away within the past two years, the proposed bulkhead will replace a bulkhead which has failed within the past two years. The burden of proof is on the applicant. Re-establishment of all other historical shoreline boundaries is prohibited when it does not meet the criteria of this chapter.

MCC 7.16.110(d)(2)⁷ provides the following use regulation:

(2) Bulkheads may be allowed to re-establish a shoreline boundary that has eroded away within the past two years. The burden of proof shall be on the applicant. Re-establishment of all other historical shoreline boundaries is prohibited when it does not meet the criteria of this chapter.

⁷ There are other use regulations related to bulkheads, but subsection (2) is the only one ARD is arguing has not been complied with. See MCC 7.16.110(d).

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2 X.

3 ARD's first argument is that the bulkhead is not necessary to re-establish a shoreline
4 boundary that has eroded away within the past two years in compliance with MCC
5 7.16.110(c)(6) and 7.16.110(d)(2)⁸. This argument is based on ARD's position that the shoreline
6 boundary has not been eroding.

7 XI.

8 The Board concludes from the evidence presented that there has been erosion of the
9 shoreline boundary within the past two years. This conclusion is based on the photographs in
10 evidence and testimony of the witnesses that shows that the toe of the slope has moved landward
11 over the period of December 2002 to January 2003.

12 XII.

13 ARD next argues that the granting of the SDP for the bulkhead is inconsistent with MCC
14 7.16.110(c)(1) and (c)(3)⁹. This is based on ARD's contention that the bluff located on Lot 3 is a
15 feeder bluff, and therefore should be protected. The Board, like the County's hearing examiner,
16 agrees that the bank on Lot 3 functions to some extent as a feeder bluff. Placing a bulkhead on
17 Lot 3 under the circumstances presented here, however, does not run contrary to Policies 1 and 3
18 of the Mason County Code. The bulkhead on Lot 3, as designed, and combined with the
19 mitigation provided by the replacement of the bulkhead on Lot 4, protects the natural shore

20 ⁸ This is issue 6 in the appeal.

21 ⁹ These are issues 7 and 9 in the appeal.

1 features. Further, the fact that the lots adjacent to Lot 3 are bulkheaded makes the bank on Lot 3
2 less effective as a feeder bluff, and the bulkheading of that bank consistent with the policy
3 language of policy (c)(3).

4 XIII.

5 ARD'S next argument is that the approval of the SDP at issue here violates policy
6 (c)(2)¹⁰ by failing to protect fish and shellfish. The only site specific evidence presented at the
7 hearing on the impacts to fish from the bulkhead on Lot 3, in combination with the bulkhead on
8 Lot 4, supports the conclusion that the project as a whole will enhance the fish and shellfish
9 habitat in the area. The Board notes that the work on the bulkheads on Lot 3 and 4 will be
10 conducted pursuant to a Hydraulics Project Approval from the Washington Department of Fish
11 and Wildlife containing 31 conditions. The Board concludes that the bulkhead on Lot 3 is
12 consistent with Policy 2.

13 D. Compliance with the policies of the Shoreline Management Act

14 XIV.

15 ARD's final contention is that the SDP approved for Lot 3 violates the policies of the
16 Shoreline Management Act (SMA), specifically RCW 90.58.020 (1), (2) and (4).¹¹ The policy
17 section of the SMA provides:

18 The legislature declares that the interest of all of the people shall be paramount in the
19 management of shorelines of statewide significance. The department, in adopting
guidelines for shorelines of statewide significance, and local government, in developing

20 ¹⁰ This is issue 8 in the appeal.

21 ¹¹ These arguments are raised in Issue 7, 8 and 10 in the appeal.

1 master programs for shorelines of statewide significance, shall give preference to uses in
2 the following order of preference which:

3 (1) Recognize and protect the statewide interest over local interest;

4 (2) Preserve the natural character of the shoreline;

5 (4) Protect the resources and ecology of the shoreline;

6 RCW 90.58.020(1), (2), and (4). The policy concepts contained in (2) and (4) have already been
7 addressed in the analysis pertaining to the challenges to compliance with the Mason County
8 Code. The Board concludes that the SDP for Lot 3 complies with these policies.

9 XV.

10 ARD's challenge of non-compliance with RCW 90.58.020(1) raises the issue of
11 cumulative effects of bulkheading.¹² The evidence presented by ARD and undisputed by the
12 respondents, establishes the value and importance of shorelines without bulkheads to the Puget
13 Sound. The tension between this value and the ability of individual residential landowners to
14 protect their property from erosion, is reflected in the exemption from the requirement of
15 obtaining a shoreline permit for building bulkheads on residential property. See RCW
16 90.58.030(3)(e)(ii), WAC 173-27-040(2)(c), and MCC 7.16.110(b). ARD's argument, as
17 summarized by its representative in oral argument, is that the SDP for Lot 3 allows the
18 bulkheading of a vacant lot. If this permit is granted, where could the line be drawn for denying
19 future SDP permits for bulkheads on vacant lots?

20
21 ¹² This is issue 10 in the appeal.

1 XVI.

2 ARD raises an important question. The answer lies in the specifics of the situation
3 presented here. First, the location of Lot 3 on an exposed point of land makes it more vulnerable
4 than many Puget Sound lots to wave and wind action. This situation is exacerbated by the fact
5 that the lots surrounding Lot 3 all have bulkheads. Second, construction of a house is planned in
6 the next few years on Lot 3. Building the bulkhead before building the house makes sense,
7 because then the bulkhead can be built from the landward side with less impact on the water
8 environment. Third, because of the planned replacement of the bulkhead on Lot 4, the overall
9 impact to the environment from the bulkhead on Lot 4 will be lessened considerably. Thus the
10 entire project (Lots 3 and 4) will have the effect of lessening the environmental impacts from
11 those present before the project.

12 XVII.

13 ARD has not offered and cannot offer any evidence of other similarly situated lots whose
14 owners might choose to apply for permits for bulkheads if this permit is approved. This is not a
15 situation of allowing one lot to be bulkheaded, thus setting off a chain of requests for additional
16 bulkheads. Instead, it is a situation where all the other lots are already bulkheaded, and the
17 effects of those bulkheads are having a negative impact on Lot 3, the last remaining
18 unbulkheaded lot. The Board concludes that approval of this SDP for the building of a bulkhead
19 on Lot 3 complies with the policies of the SMA.

1 XVIII.

2 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

3 From the foregoing, the Board issues this:

4 **ORDER**

- 5 1. ARD's request to recuse board members is denied.
- 6 2. ARD's motion for reinstatement is denied.
- 7 3. The shoreline substantial development permit for a bulkhead on Lot 3, as
- 8 approved and conditioned by Mason County, is affirmed.

9 SO ORDERED this 22nd day of November 2005.

10 **SHORELINES HEARINGS BOARD**

11 Bill Clarke, Chair

12 Mary Alyce Burleigh, Member

13 M. Peter Philley, Member

14 Kay M. Brown
Administrative Appeals Judge

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